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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 442/O.T. 1966

VOLKSWAGEN INTERAMERICA, S.A.,
Petitioner,

v.

HENRY E. ROHLSEN,
Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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There is little in respondent's Brief in Opposition which requires further comment. There are, however, two points on which a further word may be appropriate.

With respect to respondent's argument on page 6 of its brief, under its item 6, that this Court's decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947), precluded the entry of judgment for defendant by the Court of Appeals, we note that, unlike the *Cone* case, defendant here made a timely motion for judgment n.o.v., which the trial court denied. The issue in the *Cone* case was whether, when defendant had failed to make such a motion, the Court of Appeals had authority to direct the entry of judgment n.o.v. Where, however, as here, the defendant has made a timely motion in the trial court, the

Court of Appeals may of course direct that judgment n.o.v. be entered.

In this case, since plaintiff failed to prove an essential element of his case, the Court of Appeals should have directed the entry of judgment n.o.v. Even if a trial court has discretion in some circumstances to order a new trial instead of judgment n.o.v., there was no showing by plaintiff here of any special circumstances which would warrant such action. In any event, the Court of Appeals has no such discretion, and there is no indication in its opinion that it was purporting to exercise such discretion.

The next point which requires comment is respondent's argument, contained in item 7 of its brief beginning at page 6, that this Court should review the ruling of the Court of Appeals that the verdict as to damages should be set aside.

Since respondent failed to file a cross-petition for certiorari, and since the time for the filing of such a cross-petition has expired, respondent may not now seek to overturn any part of the judgment of the Court of Appeals which was adverse to him. *Alaska Industrial Board* v. *Chugach Association,* 356 U. S. 320, 325 (1958); *LeTulle* v. *Schofield,* 308 U. S. 415, 421-22 (1940).

Respectfully submitted,

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